Supreme Court, U.S.
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No. 95-329

In the Supreme Court of The United States

OCTOBER TERM, 1995

JOHN R. DOOLITTLE,

Petitioner,

v.

NATIONAL CREDIT UNION ADMINISTRATION,

Respondent

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's arguments highlight why this Court should grant the petition. This is a prime example of "Big Government" using its resources to get its way at any cost; and the individual be damned.

Respondent would have this Court rely on artful arguments that if accepted, would deny Petitioner his right to due process.

I. Notice was Inadequate to Give Petitioner a Clear Statement of the Theory on Which the Respondent was Proceeding Against Him.

Due process requires that an administrative agency give the

party charged a clear statement of the theory on which the agency will proceed with its case. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) *citing Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971). This concept of due process was incorporated by Congress into the Administrative Procedure Act, wherein: "[p]ersons entitled to notice of agency hearing must be timely informed of...the matters of fact and law asserted." 5 U.S.C. §554(b).

There is no dispute as to the fact that the "personal benefit" theory relied upon by Respondent was not contained in the "Notice of Intent to Prohibit and Impose Other Remedial Sanctions".[1] Instead, Respondent argues that "petitioner had ample opportunity to litigate that issue... [since] NCUA counsel explained in her opening statement at the hearing before the NCUA's administrative law judge" that while he did not receive financial gain "his conduct was geared to obtain a personal benefit for himself." Opp. 6. However, this issue was neither developed or argued by Respondent during the course of the administrative hearing.

Respondent's assertion, must be evaluated in the light of the NCUA's Final Decision and Order that resulted from the administrative hearing. Respondent found that: "While it is true that Doolittle did not personally profit from making the Mims loans, that is irrelevant to this proceeding. The only issue before us is whether Doolittle's failure to take appropriate action on the loans resulted in harm to Bay Gulf, and the answer is affirmative." (Emphasis added.) Fin. Ord.. 5. Respondent's representations to this Court stand in stark contrast to its stated position in its Final Decision and Order.

II. "Personal Benefit" is Subsumed Within the Definition of "Personal Gain".

The FCU Act provides authority to impose an order of prohibition if the person "received *financial gain* or *other benefit.*"

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[1] Paragraph 37 of the Notice limited the "effects" element to "financial loss and other injury" to the credit union stemming from the Mims loans.

12 U.S.C. §1786(g)(1)(B)(iii) (emphasis added).

Respondent attempts to distinguish "other benefit" (what the NCUA Board referred to as "personal benefit") (Opp. 6 - 7) from "personal profit" (which the NCUA Board determined did not exist) (Fin. Ord. 5) and also from "personal gain" (which the first court of appeals found not to exist) (Pet. App. a-5).

Respondent argues that "personal gain" is the same as "financial gain" and therefore, when the first court of appeals held that "personal gain" was not alleged in the Notice of Intent nor contained in the record (Pet. App. a-18), it did not preclude the NCUA Board's finding of "other benefit" in its reinstatement of the order of prohibition (Pet. App. a-5). This reading is plainly wrong.

"Benefit" is defined as "a pecuniary advantage or profit; gain; account; interest." Black's Law Dictionary 200 (4th ed. 1951). As is evident from this definition, there is no significant distinction between the words "benefit" and "gain" since one definition of "benefit" is "gain" Similarly, there is no discernible difference between the word "benefit" and "profit" as is readily apparent from the definition. *Id.*

Therefore, given that the NCUA found that: "Doolittle did not personally profit" (Fin. Ord 5) and the court of appeals found no assertion or proof of "personal gain" (Pet. App. a-18), it is hyperbole to suggest that "personal benefit" is somehow distinctive and provides another basis to satisfy the "effects" requirement of 12 U.S.C §1786(g)(1)(B).

Respondent has failed to focus on the first words in the terms "personal gain" and "financial gain". For it is through this analysis that the disjunctive, "financial gain *or* other benefit" in 12 U.S.C. §1786(g)(1)(B)(iii) (emphasis added), becomes clear. "Financial" is defined as "fiscal; dealing in money". Black's Law Dictionary 758 (4th ed. 1951). "Personal" is defined as "appertaining to the person". *Id.* at 1300. While "personal" is broad in its scope as a modifier of the word "gain" and includes

anything "appertaining to the person", "financial", on the other hand, is limited to a monetary gain. Therefore, the term "other benefit", or as the NCUA refers to it, "personal benefit" is essentially synonymous with the term "personal gain."

Inasmuch as the first court of appeals found no "personal gain" (Pet. App. a-18), the second court of appeal's apparent reliance on Respondent's misreading of the FCU Act caused it to improperly overrule a prior panel's decision.

III. Petitioner was not Given Proper Notice of the Alternative "Effect" Finding Concerning the Payment of Dividends.

Respondent argues that "even if the Board's finding of personal benefit were defective, the order of prohibition would nonetheless be valid on the basis of the Board's alternative 'effects' finding (Pet. App. a8-a9) that *petitioner's misconduct prejudiced the interests of the credit union members*." Opp. 8 (emphasis added). Respondent does not dispute that this charge was not contained in the Notice of Intent to Prohibit. Rather, in support of its argument that Petitioner did receive notice of the charge, Respondent cites to the opening statement of NCUA counsel at the administrative hearing wherein she stated that "the [government] will * * * show that, by reason of [petitioner's] conduct, * * * the interests of the members have been prejudiced" as the notice provided to Petitioner. *Id.*

Again, Respondent misleads this Court. The NCUA Board Decision and Order on Remand (Pet. App. a-9) relies on the dividend issue to support a showing of possible financial loss to Bay Gulf Federal Credit Union, the alternative "effect" finding in 12 U.S.C. §1786(g)(1)(B)(i) ("such insured credit union...has suffered or will probably suffer financial loss or other damage"). However, in supporting its argument (Opp. 8) that notice was provided to Petitioner, Respondent cites to the NCUA counsel's statement that she will show "the interests of the members have been prejudiced" Prejudice to the members is a separate and distinct "effect" finding in 12 U.S.C. §1786(g)(1)(B)(ii).

Therefore, as evidenced by Respondent's own representation to this Court, the asserted oral notice to Petitioner during the opening statement at the hearing did not provide notice of the charge that was ultimately cited by the NCUA Board in its Order on Remand (Pet. App. a-10, a-11).

Further, even if the notice was not defective, there is nothing in the record (i.e., documents or testimony) to support a finding that the members of the credit union were prejudiced by the payment of dividends which they received. Similarly, the administrative hearing record is devoid of any documentation on any loss or probable loss suffered by the credit union.

The NCUA addressed the payment issue in a limited context. In arguing why Doolittle's accounting practices were meaningful, the NCUA noted that the credit union would have to obtain special permission from the NCUA prior to declaring a dividend if it had insufficient earnings. Pet. App. a-25. Any suggestion of a loss or probable loss to the credit union was presented for the first time during the remand to the NCUA. There was no further testimony or document submission on this issue. Pet. App. 8 fn. 2.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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